UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist THOMAS D. DELOOFF, JR.,
United States Army, Appellant

ARMY 20130553

Headquarters, Fort Campbell
Steven E. Walburn, Military Judge
Colonel Jeff A. Bovarnick, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Payum Doroodian, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Captain Benjamin W. Hogan, JA (on brief).

9 April 2015

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of willful disobedience of a superior commissioned officer, three specifications of rape of a child and three specifications of assault consummated by a battery, in violation of Articles 90, 120 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 920, and 928 (2006 & Supp. III) [hereinafter UCMJ]. The military judge sentenced appellant to a dishonorable discharge, forty years confinement, forfeiture of all pay and allowances and reduction to the grade of E-1. The convening authority approved the sentence as adjudged and credited appellant with 183 days of confinement against the sentence to confinement.

This case is before the court for review under Article 66, UCMJ. Appellant assigns three errors, one of which merits discussion and relief. Appellant also

personally raises two additional matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1983), neither of which merit relief. [*]

In his second assignment of error, appellant asserts that the evidence supporting Specification 2 of Charge IV is legally and factually insufficient in that it alleges that appellant committed an assault consummated by a battery on "divers occasions" when he unlawfully restrained the victim, KS, by her hands and feet with handcuffs. The government concedes that KS did not testify as to the number of times appellant restrained her using handcuffs. We agree with appellant that the record supports a finding of only one occasion on which appellant restrained KS.

Accordingly we will strike the "on divers occasions" language from Specification 2 of Charge IV in our decretal paragraph.

CONCLUSION

On consideration of the entire record and the submissions by the parties, we approve and affirm only so much of Specification 2 of Charge IV as provides,

> In that Specialist Thomas D. Delooff, Jr., did, at or near Fort Campbell, Kentucky, between on or about 23 August 2010 and on or about 17 May 2012, unlawfully restrain K.S. by the hands and feet with handcuffs.

The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the error noted, the entire record, and applying the principles of *United*

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[*] Appellant alleges that one of his two civilian defense counsel, Mr. PN, "provided him with deficient performance that materially prejudiced" him. Appellant asserts that Mr. PN "had difficulty asking proper questions, an indication that he had not adequately interviewed each witness" which resulted in the military judge sustaining trial counsel's objections; that Mr. PN "failed to prepare for and properly advocate" appellant's case; and that Mr. PN "did not explore all possible strategies or advocate hard enough" on appellant's behalf. We evaluate the performance of the defense team "as a unit." *United States v. Saintaude*, 56 M.J. 888, 893 n.14 (Army Ct. Crim. App. 2002) (citing *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001)). "Where, as here, an appellant attacks the trial strategy or tactics of the defense counsel, the appellant must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). Further, where an appellant alleges improper preparation of a witness, the appellant has the burden of showing what the defense counsel failed to elicit from the witness. *See United States v. Russell*, 48 M.J. 139, 141 (C.M.A.). Appellant has failed to meet his burden in this case.

States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986) and the factors set forth in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the military judge would have adjudged the same sentence absent the error.

In evaluating the *Winckelmann* factors, our decision does not result in a change in the penalty landscape because appellant's maximum punishment remains unchanged as a result of our action. 73 M.J. at 15-16. Further, the gravamen of the offenses has not changed. Appellant remains convicted of three specifications of rape of a child, each of which carries, *inter alia*, a maximum punishment of life without parole. *Id*. at 16. In addition, this court reviews the records of a substantial number of courts-martial involving child sexual abuse. We have extensive experience with the level of sentences imposed for such offenses under various circumstances. *Id.*

The sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are hereby ordered restored.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court